

BEFORE THE POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Permanent Addition of USPS Connect
Local Mail Price Category to the Market
Dominant Product List

Docket No. MC2023-12

SURREPLY COMMENTS OF PITNEY BOWES INC.
(December 27, 2022)

Pitney Bowes Inc. (Pitney Bowes) respectfully submits these surreply comments in response to the reply comments filed by the United States Postal Service's (Postal Service) on December 23, 2022.¹ As stated in its initial comments, Pitney Bowes supports the concept of the USPS Connect Local Mail product offering, but opposes the Postal Service's request to convert the Connect Local Mail market test to a permanent product offering until the Postal Service makes changes to the implementing regulations necessary to cure the present violation of 39 U.S.C. § 404a(a)(1).

The Postal Service's reply comments misstate the relevant issue. No commenter alleged that the Postal Service's "decision to accept payments through its own solutions, Click-N-Ship or the USPS API, creates an unfair competitive advantage for the Postal Service in violation of 39 U.S.C. § 404a(a)(1)."² The Postal Service is free to accept payments through Click-N-Ship or the USPS API, but section 404a(a)(1) prohibits it from adopting a regulation that makes its own solution the *exclusive* payment option, unlawfully precluding competition from private companies and creating an unfair competitive advantage for itself. The Postal Service attempts to sidestep this core issue by arguing private firms offering competitive postage evidencing solutions are not "competitors" under section 404a because they do not engage in downstream

¹ See Reply Comments of the United States Postal Service (Dec. 23, 2022)(USPS Reply).

² USPS Reply at 1; see Comments of the National Association of Presort Mailers (Dec. 9, 2022); Comments of the National Postal Policy Council (Dec. 9, 2022); Comments of the Package Shippers Association (Dec. 9, 2022); Comments of the Association for Postal Commerce (Dec. 9, 2022); and Comments of Pitney Bowes Inc. (Dec. 9, 2022)(PB Comments).

mail delivery services or, alternatively, that the express limitations of section 404a must yield to the Postal Service's "business judgment." The Commission should reject both positions as meritless.

The Postal Service does not and cannot dispute that it is adopting a regulation that precludes competition and advantages itself. Nor can the Postal Service identify an affirmative defense that would overcome this facial violation of section 404a(a)(1). Rather it seeks to evade the plain language of the statute by arguing that section 404a(a)(1) does not apply because the regulation at issue is "not the type of conduct that the statute was intended to prevent."³

The Postal Service does not cite any support for its assertion that Congress did not intend for section 404a(a)(1) to apply to the conduct at issue in this case. As pointed out in the initial comments of Pitney Bowes and other parties there is extensive legislative history on section 404a.⁴ That legislative history confirms that section 404a was intended to prohibit the Postal Service "from using its rulemaking authority to put itself at a competitive advantage or put another party at a competitive disadvantage."⁵ A regulation that precludes competition in favor of the Postal Service's own postage evidencing solution is precisely the type of conduct that the statute was intended to prevent.

The Postal Service likewise cannot dispute that Click-N-Ship is offered in direct competition with the postage evidencing solutions offered by Pitney Bowes and other companies.⁶ Rather, it argues that Pitney Bowes and other companies offering postage evidencing solutions are not competitors "for purposes of" section 404a(a)(1). The Commission should reject this argument as unsupported and unsupportable.

Nothing in the plain language of the statute or the legislative history suggests that the "competition" the Postal Service is prohibited from precluding or setting the terms of to its own advantage should be

³ USPS Reply at 2.

⁴ See e.g., PB Comments at 2, n.5.

⁵ See Postal Accountability and Enhancement Act, S. 2468, 108th Congress (2004)(as reported by S. Comm. on Gov't Affairs, Aug. 25, 2004)(Senate Report 108-318 at 28); See House Report 109-66, Part I at 43 (Apr. 28, 2005); see also Postal Accountability and Enhancement Act, H.R. 22, 109th Congress (2005)(as reported by H. Comm. on Gov't Reform, Apr. 28, 2005).

⁶ See e.g., <https://www.usps.com/business/loyalty.htm>. As noted previously, the Postal Service not only competes in the market for postage evidencing services, it also exercises direct regulatory authority over that market. See 39 CFR §§ 501 *et seq.*

assessed as something other than its plain and ordinary meaning. Under that meaning, Pitney Bowes and other companies are in competition with the Postal Service in offering evidencing solutions because they offer evidencing solutions that compete with those offered by the Postal Service. *See U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)(products compete against one another in a relevant product market if they are “reasonably interchangeable substitutes”); *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997) (“The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.”).

The Postal Service seeks to avoid this basic conclusion with the novel contention that word “competition” should be narrowly construed to exclude upstream competitive segments of the postal value chain.⁷ The Postal Service’s argument that section 404a(a)(1) only protects those competitors that “compete with the Postal Service for mailing or shipping customers” would invert and nullify the statutory provision. With respect to market dominant postal products, like USPS Connect Local Mail, the Postal Service enjoys a statutory monopoly over the downstream delivery function. The argument that section 404a preempts any claim of competitive foreclosure by firms offering “upstream” services because those services are complementary of downstream delivery services, turns the statutory provision on its head by allowing the Postal Service to abuse its monopoly position because it is a monopolist.

Companies offering complementary services to market dominant postal products are particularly vulnerable to competitive foreclosure because the Postal Service has “monopsony power over the (largely competitive) providers of upstream services.”⁸ This market power, if misused, would enable the Postal

⁷ *See generally*, Testimony Before the President’s Commission on the Postal Service, Robert H. Cohen, Director, Office of Rates, Analysis and Planning, Postal Regulatory Commission (Feb. 20, 2003) at 2, (discussing “extensive competition” in upstream postal supply chain functions); *see also* Docket No. R2006-1, Direct Testimony of John C. Panzar (PB-T-1)(Sept. 6, 2006) at 2, 12-13 (discussing the Postal Service as a two-stage vertically integrated network with competitive upstream segments and a downstream “bottleneck” in which the Postal Service always performs the delivery function; discussing postage evidencing as a form of expanded worksharing). For present purposes, the Commission need not decide whether postage evidencing is a worksharing function, it is sufficient to show that postage evidencing is a contestable segment of the postal supply chain where the Postal Service competes with private firms offering services that complement its final mile delivery function.

⁸ John C. Panzar, “Toward a 21st Century Postal Service,” Crew and Kleindorfer, eds., *Multi-modal Competition and the Future of Mail* (2012) at 147.

Service to use its regulatory or standard setting authority to offer similar upstream products and services in direct competition with private firms and to foreclose those private firms from competing effectively or preclude competition altogether, even if the private firms' products and services were superior in price or quality. Categorically excluding these same firms from the protections of section 404a(a)(1) is inconsistent with the plain language and intent of the law, and would essentially nullify it.

The Postal Service's contention that it cannot be considered to compete with upstream complementary service providers because it has a downstream monopoly is also foreclosed by relevant competition law precedent. In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the United States Supreme Court held that a firm can be held liable for monopolizing a market limited to the service of its own brand of equipment, even if unlike the Postal Service it is operating in a competitive primary market. In *Kodak* the defendant was attempting to monopolize a complementary downstream market rather than a complementary upstream market, but the principle is the same. Moreover, the principle that a firm cannot use its monopoly power in one market to obtain an advantage in a second related market is exactly the one that section 404a(a)(1) expresses.

The Postal Service's reliance on Order No. 5550 is also misplaced.⁹ There the Commission reasonably concluded that it would not be practical to find that the Postal Service could never remove a product (customized postage) from the mail classification schedule once introduced.¹⁰ Here, the Postal Service is proposing to introduce a new product where competitive alternatives already exist. It is a perfectly sensible result for the Commission to hold that the Postal Service cannot introduce a new permanent product in a manner that violates section 404a(a)(1) by unambiguously precluding competition and creating an unfair competitive advantage for the Postal Service. The competitive analysis in Order No. 5550 is also distinguishable. In that case the Commission was evaluating the Postal Service as a "direct competitor to its own customers for creation of personalized postage."¹¹ Here the competitive analysis is

⁹ See Docket No. MC2020-126, Order No. 5550 (June 16, 2020).

¹⁰ See Order No. 5550 at 5-6.

¹¹ *Id.*, at 5.

between the Postal Service and other competitors offering alternative postage evidencing solutions to customers.

The Postal Service's fall back argument that its "business judgment" can override statutory limitations on unfair competition must be rejected. No party disputes that the Postal Service may exercise its business judgment in developing new service offerings. But that business judgment is necessarily constrained by the limitations imposed by law, including section 404a(a)(1) which states unless "specifically authorized by law," the Postal Service cannot adopt a regulation precluding or establishing the terms of competition that creates an unfair competitive advantage for itself.¹² The Postal Service cannot cite any specific authority in this case for its preclusion of competition. To the contrary, the only authority it cites is the authority under section 404(a)(2) to "prescribe . . . the manner in which [postage] is to be paid."¹³ This is insufficient. The Commission has held that the Postal Service's general and specific statutory authorities, including section 404(a)(2), are subject to the statutory limitations of section 404a.¹⁴

The claim that only Click-N-Ship can meet the needs of customers is unsupported and inconsistent with the competitive offerings already in the marketplace. The Postal Service has introduced no evidence that it has attempted to work with other postage evidencing providers to address the "functionality" issues it purports to raise here. In fact, the Postal Service's responses to the most recent Chairman's information request confirm the opposite. Despite the section 404a issues having been raised more than a year ago, the Postal Service is not actively evaluating or pursuing additional payment options, it has no plan to do so, and refused to provide the Commission an explanation as to why it has no such plan.¹⁵ For the same reasons the Commission should reject the Postal Service's suggestion that it may cure the facial violation of section

¹² 39 U.S.C. § 404a.

¹³ 39 U.S.C. § 404(a)(2).

¹⁴ See Docket No. RM2013-4, Order Establishing Final Rules Pursuant to 39 U.S.C. 404a (Oct. 6, 2014) at 13 (Order No. 2207)(("Authority for all Postal Service action is derived from its general and specific authority that is set forth in 39 U.S.C. 401 and 404 . . . Action by the Postal Service pursuant to either of those sections is limited by and subject to 39 U.S.C. 404a[.]").

¹⁵ See Response of the United States Postal Service to Chairman's Information Request No. 2, Question 12 (Dec. 23, 2022).

404a(a)(1) in some unspecified way, at some unspecified time once USPS Connect Local Mail is offered as a permanent product.

For the reasons stated in the initial comments and above, the Commission should deny without prejudice the Postal Service's request to convert USPS Connect Local Mail market test to a permanent product offering and direct the Postal Service to use the remaining duration of the market test period to cure the section 404a issues.

Respectfully submitted:

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